

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 93-2	)	PREHEARING ORDER NO. 1	672
	)		
of	)	PREHEARING ORDER GRANTING,	
	)	GRANTING UPON CONDITION, AND	
KVA RESOURCES, INC.	)	DENYING PETITIONS FOR	
	)	INTERVENTION; ADOPTING	
For Site Certification	)	HEARING GUIDELINES	
.....	)		

This is an application for certification of a proposed site at Creston, Lincoln County, Washington for construction and operation of a natural gas-fueled combustion turbine facility to generate electrical energy.

This application was filed on December 13, 1993. Notice of the initial prehearing conference and of the opportunity to present petitions for intervention was published on October 14, 1994. Numerous petitions for intervention were filed. The Council held prehearing conferences on November 16 and December 9, 1994.

**APPEARANCES.** The following parties and petitioners for intervention made document filings or participated in the prehearing conferences.<sup>1</sup>

<b>Applicant</b>	<b>KVA Resources Inc.</b> , by Darrell Peeples, Attorney, Olympia, Washington
<b>Counsel for the Environment</b>	<b>Ms. Deborah Mull</b> , Asst. Attorney General Olympia, Washington
<b>Council Member Agencies</b>	<b>Dept. of Ecology</b> , by Jay Manning, Asst. Attorney General, Olympia
	<b>Dept. of Fish and Wildlife</b> , by William C. Frymire, Asst. Attorney General, Olympia

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<sup>1</sup>Participants were asked to designate one person and location for service of documents in the proceeding. For those who have identified two, the Council will select one and will continue to use that person and address unless the party specifies that a different person or location should be used.

**Washington State Energy Office**, by Tommy Prud'Homme, Asst. Attorney General, Olympia

**Petitioners for Intervention:**

**Federal Agencies<sup>2</sup>**

**United States Dept. of the Interior, Bureau of Reclamation**, by Tony Sullins, Attorney, Boise, Idaho

**United States Department of Energy, Bonneville Power Administration**, by Nancy B. Baker, Asst. General Counsel, Portland, Oregon

**Tribes**

**Confederated Tribes of the Colville Reservation**, by Bruce Didesch, Attorney, Nespelem, Washington

**Spokane Tribe of Indians**, by Christopher B. Gray, Attorney, Wellpinit, Washington

**Local Government**

**Board of Lincoln County Commissioners**, by Deral Boleneus, Chair, Davenport, Washington

**Wilbur Public Schools**, by Lester Portner, Superintendent, Wilbur, Washington

**Creston Public Schools**, by Michael E. Crowell, Superintendent, Creston, Washington

**Lincoln County Fire Protection District No. 7**, by Clarke B. Snure, Attorney, Des Moines, Washington

**Labor Unions**

**United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 44**, by Scott B. Smith, Business Representative, Spokane, Washington

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<sup>2</sup>The Dept. of the Interior, National Park Service presented, then withdrew, a petition for intervention.

**Environmental  
Organizations**

**Columbia Valley District Council of  
Carpenters, Millwright Locals Nos. 1699  
and 2205**, by Jerome R. Johnson,  
President, Pasco, Washington

**Citizens Concerned About Washington's  
Energy Future**, by Patti Lowe, Seattle,  
Washington

**Big Bend Water Resources Committee**, by  
Donald E. Walter, Odessa, Washington

**Greenpeace, USA**, by Sallie Schullinger,  
Seattle

**Greenpeace, Canada**, by Sallie  
Schullinger, Seattle

**Northwest Environmental Advocates**, by  
Nancy Holbrook, Manager, Clinton,  
Washington

**Utility Companies**

**The Washington Water Power Company**, by  
Jerry K. Boyd, Attorney, Spokane

**Citizens and**

**Lincoln County Ag Coalition**, by Daniel  
**Citizens'** C. Buob,  
Chairman, Edwall, Washington

**Organizations**

**Joseph Kelley**, Seattle

**Karen Jones, Robert Jones, Norman  
Houger, and Annie Houger**, Creston,  
Washington

**Joe Bean**, Wilbur, Washington

**Marvin J. and Lenora H. Bean & Sons**,  
Creston

**John Klingele**, Yakima, Washington

In this order, the Council expresses its decision granting, granting upon condition, and denying petitions for intervention. It also adopts hearing guidelines that are based on a draft circulated for comment to parties and petitioners for intervention.

## I. HEARING GUIDELINES.

The Council adopts for this proceeding the hearing guidelines that are attached as Appendix A. A draft of the guidelines was circulated to all parties and all petitioners for intervention. The Council intends to use them as a guide to its conduct of the proceeding, and circulates them among parties as an indication of its expectations and to allow parties to develop expectations about the conduct of the proceeding. The Council reserves the authority to vary from the guidelines when there is reason for doing so.

## II. Petitions for Intervention.

### **A. Standards for granting or denying intervention.**

**1. Parties of right.** When the Council enters into an adjudication upon an application for site certification, there are two statutory parties of right. These are the Applicant<sup>3</sup> and Counsel for the Environment.<sup>4</sup>

**2. State agencies.** Another class of entities has a right to participate under Council rules: any Council member state agency is entitled to party status by operation of WAC 463-30-050 and -060. Three state agencies have indicated their intention to participate in this adjudication: the Departments of Ecology and Fish & Wildlife, and the Washington State Energy Office. It is immaterial for our purposes whether or not we call them intervenors, although technically that is what they appear to be -- their participation as full parties is provided for by the rule, each has statutory responsibilities to pursue, and each has filed a document identifying itself and its interests in the proceeding.

**3. Petitions for intervention; standards for granting intervention.** Twenty-three petitions for intervention were filed by parties who have no "absolute" right to participate under statute or rule. In reviewing these petitions, the Council considered the petitions, oral comments made at the prehearing conferences, and any supplementary filings made by the petitioner. In addition, it considered pertinent provisions of the statute and of the Council's rules and it considered pertinent decided judicial appellate cases and other recognized legal research materials as identified in this order.

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<sup>3</sup>RCW 80.50.090.

<sup>4</sup>RCW 80.50.080.



**a. Adjudicative Proceeding.** The Council must hear applications for site certification as adjudications, with minor exception.<sup>5</sup> This proceeding is an adjudication established by statute to determine the applicant's right to complete a single, specific, proposed project in light of existing state and federal environmental requirements. It is not a rulemaking, in which the broadest possible public participation is encouraged at every stage in order to determine policies under the law.<sup>6</sup> Instead, it is a limited proceeding, conducted under adjudicative rules and processes for the protection of parties' rights, to answer a single question. Unlike a rulemaking, "open entry" to an adjudication would be improper because it could adversely affect the rights of the parties whose narrow interests are being resolved, and it could adversely interfere with the Council's ability to conduct a fair and efficient hearing.

Also unlike a meeting or a rulemaking, persons who are granted intervenor status assume responsibilities that they must meet in order to protect their own interests and in order for the adjudicative process to be manageable for all participants. Intervenors must appear in the proceeding, either on their own behalf or by an attorney. Intervenors must study other parties' cases so they can participate knowledgeably. They must decide whether to question other parties' witnesses, and determine the questions to be asked. Intervenors have the responsibility either to attend the entire proceeding, including conferences, or to monitor it to learn when their interests will be at issue -- otherwise, they may be bound by matters that are resolved in their absence. They or their representatives have the responsibility to become familiar with the Council's procedural rules and guidelines, so they may participate knowledgeably and effectively to advance their interests, knowing what is expected and how to proceed. The Council is limited in its ability to instruct participants, because that would delay the proceeding and could interfere with their or other parties' rights. Intervention is not a step to be approached casually.

**b. Administrative Procedure Act (APA).** The basic document governing administrative adjudications is the state's

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<sup>5</sup>RCW 80.50.090(3)

<sup>6</sup>Public participation in the adjudication is accommodated in two ways: by the creation and designation of Counsel for the Environment in RCW 80.50.080, to represent "the public and its interest in protecting the quality of the environment", and by the requirement that members of the public do have the opportunity to participate in the hearing by presenting testimony. RCW 80.50.090(3).

Administrative Procedure Act, or APA, set out in Chapter 34.05 RCW. The APA contains provisions allowing, and setting parameters on agency treatment of, intervention. RCW 34.05.443.<sup>7</sup>

Under the statute, an agency may grant intervention if it finds that the petitioner for intervention qualifies under a provision of law; that the intervention is in the interests of justice, and that it will not impair the orderly and prompt conduct of the hearing. The statute permits the imposition of conditions upon intervenors, and it permits the agency to impose those conditions at any time. The statute also allows the agency to impose limitations as to the issues an intervenor may address; limitations on the use of discovery, cross examination, and other procedures to promote the prompt and orderly conduct of the hearing, and may require two or more intervenors to combine their participation.

Intervention is an issue that shall be considered at a prehearing conference and decided by the presiding officer (here,

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<sup>7</sup>The statute reads as follows:

**RCW 34.05.443 Intervention.** (1) The presiding officer may grant a petition for intervention at any time, upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

(2) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; and

(b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(3) The presiding officer shall timely grant or deny each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of the decision granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

the Council) in a prehearing conference order.<sup>8</sup> The result of the order shall bind the course of the hearing unless objection is raised within 10 days after entry of the order.

**c. Council regulations.** The Council's regulations regarding intervention are set out at WAC 463-30-400 and -410.<sup>9</sup> They parallel the statute.

**d. Analysis of requirements.**

**i. Qualification.** A person "qualifies under any provision of law" for intervention by filing a timely petition,

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<sup>8</sup>WAC 463-30-270.

<sup>9</sup>Those sections read as follows:

**WAC 463-30-400 Intervention.** On timely application in writing to the council, intervention shall be allowed to any person upon whom a statute confers a right to intervene and, in the discretion of the council, to any person having an interest in the subject matter and whose ability to protect such interest may be otherwise impaired or impeded. All petitions to intervene shall be verified under oath by the petitioner, shall adequately identify the petitioner, and shall establish with particularity an interest in the subject matter and that the ability to protect such interest may be otherwise impaired or impeded. In exercising discretion with regard to intervention, the council shall consider whether intervention by the petitioner would unduly delay the proceeding or prejudice the rights of the existing parties. The council may establish a date after which petitions to intervene will not be considered except for good cause shown. When such a date has been established, the council will assure that adequate public notice is given.

**WAC 463-30-410 Participation by intervenor.** In general, it is the policy of the council to allow any intervenor broad procedural latitude. To the extent that the council determines that numerous intervenors might unduly delay the proceedings or prejudice the rights of existing parties, intervenor status may be conditioned upon assent by the prospective intervenor and counsel for the environment to allow the counsel for the environment to act as lead counsel for the balance of the hearing, where the intervenor's interests more closely align with those of the counsel for the environment. Intervenor status may also be conditioned upon allowance of other parties to act as lead parties, where appropriate. The council reserves the right to prescribe other limitations and conditions, where appropriate.



verified under oath,<sup>10</sup> demonstrating an "interest in the subject matter of the proceeding" and impairment or impendance of its ability to protect that interest if it is not allowed to intervene. The Council has the authority to condition and limit interventions, consistent with the statute.

**ii. Interest in the subject matter.** Petitioners must demonstrate an "interest in the subject matter" of the proceeding and that their ability to protect that interest may be impaired or impeded if they are not allowed to intervene.

"Interest" is not used in the sense of "being interested," but in the sense of having a legal as opposed to philosophical interest that the intervention will afford an opportunity to protect.<sup>11</sup> Intervention may be allowed to protect such an interest when failure to participate could adversely affect the interest in a direct and substantial way. The rule places the burden on the petitioner to establish its interest "with particularity", that is, clearly and specifically, and to establish that the failure to allow intervention could impair that interest.

**iii. Representations considered.** Petitioners had the opportunity to express their interest not only through the initial petition, but also through oral statements at the

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<sup>10</sup>Most of the petitions were not verified. The applicant waived verification, and the Council will not reject the existing petitions for lack of verification. The Council must expect that all participants, however, be aware of and meet their basic obligations under pertinent law and rules.

<sup>11</sup>A similar term in the Federal Rules of Civil Procedure, Rule 24(a)(2), has evoked varied application and considerable legal comment. See, for example, Tobias, "Standing to Intervene", 1991 Wisconsin L.Rev. 415; "Note: Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right", 1990 Univ. of Illinois L.Rev. 605; "Note: Intervention in the Public Interest under Rule 24(a)(2) of the Federal Rules of Civil Procedure", 45 Washington and Lee L.Rev. 1549 (1988). The United States Supreme Court seems to have resolved much of the uncertainty by defining interest in this context as a legally protected interest subject to an invasion in the litigation that is concrete and particularized, actual or imminent. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992). Under the analogous provision of the Washington civil rules, the Washington State courts require an immediate, concrete and specific injury to an interest in which the petitioner has a right. See, Trepanier v. Everett, 64 Wn.App.380 (1992).



prehearing conferences and through supplemental presentations authorized by the Council. They also had the opportunity to answer any objections presented to the petition. The Council considers the petition, the oral comments, if any, and the supplemental comments and answers to objections, if any, in ruling on each petition to intervene.

**iv. Burden on the proceeding.** In determining whether to grant intervention, the Council may determine under the statute whether the intervention would impair the orderly and prompt conduct of the hearing and under the Council rule whether intervention would impair the rights of existing parties or unduly delay the proceeding.

The Council has an obligation to its own administrative processes, to the applicant, to all participants, to the Council members, and to the public to maintain a process that not only fairly and legally allows it to reach a decision, but also does so effectively and efficiently. The statutory time limit on Council decisions imposes an obligation to conduct a timely proceeding and evidences the legislative intention that the Council conduct its process efficiently.

Unnecessary duplication of representation of the same interest, if the interest is otherwise adequately represented, imposes an unnecessary and undue burden of time and resources on the parties and will impair the orderly and prompt conduct of the hearing.

**v. Cooperation and coordination.** The Council is gratified at the evidence of cooperation and coordination that has been shown by the potential intervenors, including the state agencies. It especially appreciates the leadership shown in that regard by Counsel for the Environment. If the promise of coordination and cooperation that is expressed in the parties' actions to date is fulfilled, future limitations on the intervenors may well be unnecessary.

**vi. Condition upon intervention.** The Council may also consider potential delay and burden in deciding whether to condition intervention on the designation of lead party, or on the coordination or combination of presentations. The Council retains the authority to impose such conditions on interventions during the proceeding if doing so appears to be necessary.

**vii. Limitations on intervention.** Finally, the Council may limit the participation of intervenors in discovery, cross examination, or other procedures, and may limit the issues an intervenor may address, not only at the time it grants intervention but at any time. In general, when potential

intervenors have defined their interest as relating to limited issues, the intervention will be limited to matters relating to those issues.

**B. Rulings on specific petitions for intervention.**

**1. Federal agencies:** Three federal agencies petitioned for intervention. One, the Dept. of the Interior, National Park Service, withdrew. Each of the two remaining agencies has interests that it is charged by law with representing, and each asks intervention to assert those interests on behalf of the federal government and the public of the United States. The petitions should be granted, limited to the issues specified in the petitions.

**a. Dept. of the Interior, Bureau of Reclamation.**

The petition for intervention of the Department of the Interior is granted, limited to the issues of regional water and wildlife matters within the Bureau's jurisdiction.<sup>12</sup>

**b. Dept. of Energy, Bonneville Power**

**Administration.** The petition for intervention of the Bonneville Power Administration is granted, limited to the issue of electrical transmission required by construction and operation of the proposed facility.

**2. Tribes:** Each of the Tribes has rights under federal law that it seeks to pursue and protect on behalf of its members, that no other parties are charged with protecting. Each of the Tribes also committed that it would coordinate its participation with the other Tribe intervenor and with other participants with similar interests, such as Counsel for the Environment and the State Agencies. Doing so does not mean that either tribe will lose its identity, but that each will cooperate to avoid repetition and duplication of efforts. The petitions should be granted.

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<sup>12</sup>The Bureau states a preference against coordination of its participation with any other interest, contending that doing so might affect its identity and its impartiality in possible future licensing or contracting activity and that its interests are unique. The Council does not perceive that coordination will adversely affect any of these Bureau interests, but will benefit not only it but other parties and the Council by avoiding the time and expense of unnecessary duplication as well as possible embarrassment. The Council expects that the Bureau will coordinate its participation with other participants, especially Counsel for the Environment and the Washington State Departments of Ecology and Fish and Wildlife.

**a. Confederated Tribes of the Colville Reservation and the Spokane Tribe of Indians.** The petitions for intervention of the Colville Tribes and the Spokane Tribe are granted.

**3. Local Governments:** Each of the local governments have interests to assert on behalf of citizens. The county asserts its interests in a broad sense; the other governmental participants assert their economic interests in a more limited sense.

**a. Board of Lincoln County Commissioners.** Lincoln County is a Council member agency for purposes of the intervention rule. It also is responsible for a variety of interests on behalf of county citizens. Lincoln County's petition will be granted and it will be permitted to participate as a full party.

**b. Wilbur and Creston Public Schools.** The School Districts' petitions for intervention state limited interests. The Districts did not choose to participate in the prehearing conferences or to supplement their petitions. The applicant indicated that it will pursue agreements with the Districts that could satisfy all interests and avoid the need to intervene. The Council will reserve a ruling on these petitions until May 1, 1995, to allow negotiations to occur. If the parties do not reach agreement, and either of the Districts finds it necessary to pursue their petitions to intervene, it must by May 15, 1995, verify that it has made a good faith effort to negotiate, briefly describe the effort, and formally request that the Council rule on the petition.

**Lincoln County Fire District No. 7.** The fire District has stated specific interests relating to its ability to meet fire protection demands during Project construction and operation with the resources available to it. The District's petition is granted, limited to the issue stated.

**3. Labor Unions:** The labor unions state environmental concerns that appear indistinguishable from the interests of members of the public. To that extent, they have no "interest" in the application other than the interests of the public in environmental quality that are adequately addressed by Counsel for the Environment and the state agencies, and failure to allow intervention will not adversely affect them any more than any member of the public. The socioeconomic consequences of construction and operation will be addressed by Counsel for the Environment and by Lincoln County.



One of the unions lists names of members that it contends reside near the proposed facility and engage in activities such as farming, and asks leave to intervene to represent their interests. It has not specifically identified any affected persons or interests with sufficient particularity; the affected interests will be adequately represented by existing parties; and allowing the intervention would unduly delay the proceeding or prejudice the rights of existing parties. The petitions should be denied.

**a. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 44, and Columbia Valley District Council of Carpenters, Millwright Locals Nos. 1699 and 2205.** The petitions of the labor unions will be denied.

**4. Environmental organizations.** The environmental organizations are strongly interested in -- that is, concerned about -- environmental and social issues including global warming, acid rain, long term energy supply, and the wise use of resources. They have not, however, demonstrated a legal interest that they have, as organizations, for which denial of intervenor status would impair or endanger, other than their interests in environmental issues as members of the public.

Counsel for the Environment is an office created by statute to represent the public and its interest in environmental quality.<sup>13</sup> In addition, the state agency intervenors also identify such interests as issues that they will pursue. There is no suggestion in any presentation that public environmental interests will be inadequately represented -- to the contrary, it appears to date that the interests are being represented in an exemplary fashion.

To the extent that the environmental organizations would represent the interests of persons living near the facility, the individuals and their interests are not identified with particularity. The organizations did not name individual members affected, nor did they appear to contend that their purpose in intervening was to represent the legal interests of those persons; instead, they identified their concerns as the environmental issues that Counsel for the Environment is empowered to represent. Counsel for the Environment represents

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<sup>13</sup>The existence of Counsel for the Environment, alone, does not bar any person's intervention. The adequacy of its participation and the context of the proceeding may be considered under other provisions of law to determine whether interventions may be granted. See, e.g., RCW 34.05.443.



the broad range of environmental interests on behalf of members of the public throughout the state -- in Seattle, in Yakima and Wenatchee, and in Spokane and Creston. The same is true of the state agency participation. The interests of local residents, farmers, and others also are adequately represented by other parties, and granting intervention to the environmental organizations would unduly delay the proceeding or prejudice the rights of existing parties.

These petitioners in general have demonstrated that they are responsible, knowledgeable, active, and experienced in energy and environmental policy development within the state. They are to be commended for their interest and their dedication.

This is an adjudication, however, directly and substantially affecting the rights of a limited number of persons relating to the application, rather than the development, of policy. Standards for intervention allow and require the Council to honor the rights of the parties to conduct the litigation as they deem appropriate, and the parties' rights to a proceeding free from undue delay caused by an unnecessary multiplicity of participants.

Denial of the interventions, of course, does not impair petitioners' members' rights as citizens. They may attend and observe all hearing sessions to the same extent as any member of the public. They may appear and testify at the public hearing or hearings designated to hear evidence from members of the public, subject to any reasonable limitations applicable to all such witnesses. The organizations and their members may also participate fully in the environmental impact process.

Finally, the environmental organizations may support the efforts of parties of record. In that regard, the Council notes that Counsel for the Environment spoke in favor of the interventions. Counsel for the Environment has considerable latitude in formulating her participation. Among other things, she may choose to associate counsel from the petitioning organizations for a single presentation and may choose to cooperate with the organizations in her representation of public and environmental interests.

**a. Citizens Concerned About Washington's Energy Future, Greenpeace, USA, and Northwest Environmental Advocates:** the petitions for intervention will be denied, consistent with the discussion above.

**b. Greenpeace, Canada:** This organization is one step further removed from the interests of other environmental organizations. It expressed its concern as including the environmental effects of natural gas drilling and retrieval in

Canada, a source of fuel for the Project, and stated that its lack of success at working with Canadian government environmental officials and processes led to its interest in intervention. Greenpeace, Canada does not demonstrate how the Council is empowered to change Canadian environmental policies, however. The Council has no apparent jurisdiction over Canadian environmental regulation. It is precluded by the United States Constitution from engaging in foreign policy or relations, and by State Constitution and statute from acting outside its jurisdiction. Greenpeace, Canada, has stated no interest that the Council is empowered to control.

The Council considers the broader environmental effects of a proposed project in the environmental impact statement process under the State Environmental Policy Act.<sup>14</sup> Greenpeace, Canada may participate in that process, occurring independently of the adjudicative process. The petition for intervention will be denied.

**c. Big Bend Water Resources Committee:** This organization seeks to have water recycled through existing dry or shrinking watercourses in the territory of the proposed plant. Doing so may be an admirable goal, but the petition does not explain who the members of the Committee are, what interest they have that could be adversely affected by failure to participate, or how their stated goal might be met by their participation. To the extent that this petitioner's interests are consistent with those of local citizens, government, and organizations, those parties may find it advantageous to cooperate with Big Bend. The petition for intervention, however, should be denied.

**5. Washington Water Power Company.** This regulated public utility requests intervention to address effects of plant construction and operation upon its own transmission system and the potential diversion of water for the project from use by its own generating facilities. It has direct and substantial interests in the proceeding, not otherwise represented, and intervention should be permitted, limited to those interests.

**6. Citizens and Citizens' Organizations.** Several petitions were presented by individual citizens, and one by a group of citizens, residing near the proposed facility. In general terms, they have stated an interest qualifying them for intervention, which will be allowed, limited to the effects of

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<sup>14</sup>That is not without limitations -- see, for example, Natural Resources Defense Council v. Nuclear Regulatory Commission, 647 F.2d 1345 (D.C. Cir., 1981); Greenpeace USA v. Stone, 748 F.Supp. 749 (Dist. Hawaii, 1990).

plant construction and operation upon their properties and conditioned upon their cooperating for a single participation.

Some of the petitions state concerns with construction or operation of a natural gas pipeline or an electric transmission line. It appears at present that federal law bars the Council from considering those facilities. The Council will not allow participation in the hearings on issues not within the scope of the hearing. To the extent that the issues are appropriately considered in the SEPA environmental impact review, any person may participate.

Two citizens appeared to have no personal legal interest that could be adversely affected by failure to intervene, other than their interests as members of the public; those interests are adequately represented by Counsel for the Environment and by other participants.

**a. Lincoln County Ag Coalition:** This organization is composed of six organizations representing varied interests of agricultural producers in the region of the plant, whose concerns are the specific effects of plant operation upon their business and personal interests. Their concerns differ significantly in focus from the concerns of citizens generally. This petition is granted, with the intervention limited to effects that are within the Council's jurisdiction<sup>15</sup> of plant construction and operation upon the lands of organization members, and conditioned on its acting as lead party for intervening individuals, identified below.

**b. Karen Jones, Robert Jones, Norman Houger, and Annie Houger, Joe Bean, and Marvin J. and Lenora H. Bean & Sons:** These petitioners are individual landowners whose properties are near the proposed facility or may be affected by it. Their interests are similar to or identical with those of the Ag Coalition. Their petitions are granted, limited to the effects that are within the Council's jurisdiction of plant construction and operation on their lands, and conditioned upon their coordination and cooperation with the Lincoln County Ag Coalition as lead party for a single presentation and for single cross examination, discovery, etc.

**c. Joseph Kelley, Seattle, and John Klingele, Yakima, individual citizens, identified no interests that would**

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<sup>15</sup>For example, federal law forbids the Council from siting the natural gas pipeline and the electric transmission facilities that will be associated with the plant under the proposal now before the Council.



be adversely affected by the proceeding apart from their general interests as citizens of the state. Those interests are adequately represented in this application by Counsel for the Environment and other parties. Mr. Kelley's and Mr. Klingele's petitions will be denied on the same basis as the denial of the environmental organizations' petitions.

SUMMARY.

Based on the petitions for intervention, the oral argument and comments presented at prehearing conferences, the responses to objections, and the supplemental comments that the participants have presented, and also based on participants' commitment to cooperate and coordinate, the Council makes and enters the following Order.

O R D E R

THE COUNCIL ADOPTS the hearing guidelines attached to this Order as Appendix A, to govern the course of the hearing unless modified.

THE COUNCIL FINDS That the petitioners whose petitions are granted qualify for intervention under a provision of law; that the intervention is in the interests of justice; and that subject to later modification as may be appropriate, with proper cooperation and coordination, with any limitation as to subject matter imposed herein, and with any conditions imposed herein, the interventions that are granted will not impair the orderly and prompt conduct of the hearing.

THE COUNCIL ORDERS That the petitions for intervention of the Confederated Tribes of the Colville Reservation, the Spokane Tribe of Indians, and Lincoln County are GRANTED; and

THE COUNCIL FURTHER ORDERS That the petitions of the United States Dept. of the Interior, Bureau of Reclamation, the United States Dept. of Energy, Bonneville Power Administration, Lincoln County Fire Protection District No. 7, The Washington Water Power Company, Lincoln County Ag Coalition, Karen Jones, Robert Jones, Norman Houger, and Annie Houger, Joe Bean, and Marvin J. and Lenora H. Bean & Sons are GRANTED, AS LIMITED AND/OR CONDITIONED in the text of this Order; and

THE COUNCIL FINDS That the petitioners for intervention whose petitions it denies have not demonstrated that they qualify for intervention under a provision of law, or that the petitioners have not demonstrated an interest that is not already adequately represented in the proceeding and that allowing the intervention would impair the orderly and prompt conduct of the



hearing; and that in each instance of denial the intervention is not in the interests of justice.

THE COUNCIL ORDERS That the petitions of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 44, Columbia Valley District Council of Carpenters, Millwright Locals Nos. 1699 and 2205, Citizens Concerned About Washington's Energy Future, Big Bend Water Resources Committee, Greenpeace, USA, Greenpeace, Canada, Northwest Environmental Advocates, Joseph Kelley, and John Klingele are DENIED.

THE COUNCIL RESERVES RULING on the petitions of the Wilbur and Creston School Districts, subject to renewal of the petitions as specified in the body of this Order.

DATED and effective at Olympia, Washington this 20th day of January, 1995.

*Frederick S. Adair*

FREDERICK S. ADAIR, EFSEC Chair

**NOTICE TO PARTICIPANTS:** Unless modified, this prehearing order will control the course of the hearing. Objections to this order may be stated only by filing them in writing with the Council within ten days after the date of this order.

## Hearing guidelines

KVA, Application No. 93-2

### Washington State Energy Facility Site Evaluation Council

These guidelines are of a general nature and are provided to assist counsel in understanding the Council's expectations and how it will manage the adjudicative hearing. The Council may, when appropriate, vary from the guidelines or use measures not specified.

#### Administrative matters.

(1) **General; administrative matters.**

(a) **Case-related correspondence, pleadings, etc.,** should be addressed to the Council, not any Council member or staff member. Correspondence addressed directly to an individual may not be logged in, may not be inserted in the case file, and may not constitute a part of the official record for appeal or for other purposes. **Number of copies:** Unless other instructions are given or other arrangements are made with the Council Manager, parties shall file an original and 20 copies of pleadings and case-related correspondence.

(b) **Starting times** will be strictly observed. The hearing may proceed without counsel who are late.

(c) All counsel are expected to address comments, objections, and statements to the Council rather than to other counsel. Questions will be addressed to the witnesses rather than to counsel.

(d) There will be no **off-the-record discussions** at the request of counsel unless counsel first asks leave to go off the record and states the purpose for the request. Extended **colloquies** regarding procedural issues should be conducted off the record. After such a colloquy, each attorney will be given the opportunity to state for the record a summary of his or her view on behalf of his or her client when the record resumes.

(e) **Predistributed evidence.** The Council may require that parties' evidence be distributed to the Council and other

parties in advance of the hearing or hearing session. The schedule for predistribution will be determined after consultation with the parties.

(f) **Pleadings and Exhibits.** All pleadings and prepared exhibits shall be 8-1/2 by 11 inches in size or reduced to that size. They may be folded to that size if reduction would render the document illegible. Every pleading and exhibit shall be punched for insertion into three-ring binders. Line numbers shall be set out on all prepared testimony to facilitate transcript or exhibit references. Large documents, charts, etc., may be used at the hearing for illustrative purposes so long as a legible reduction is provided for inclusion in the record.

(g) **Hearing format.** The Council will decide hearing format and schedule after hearing parties' comments. At least three format models are available: exchange of evidence, followed by a single hearing session; individual hearing sessions for cross examination of applicant's case, intervenors and Counsel for the Environment's case, and rebuttal cases; and individual hearing sessions for cross-examination of all evidence on a given topic. In addition, one or more hearing sessions will be held specifically for the purpose of receiving comment from members of the public.

(h) **Objections.** The Council need not specifically ask each representative whether that party objects to an offer of evidence or other motion or proposed action. Instead, the Council may ask generally whether there are objections, and persons having objections shall state them. Failure to respond or object means that the party does not object, and will constitute a waiver of the right to object.

- (2) **Daily prehearing conferences** or administrative sessions. The Council will set a time prior to the start of the presentation of evidence for a prehearing conference for marking, distribution, and argument regarding objections to exhibits to be offered during the day and for arguing motions or other matters. Counsel who anticipate such matters should request that the time be set aside.

- (3) **Petitions and motions.**

(a) **Time for Filing.** When a party asks the Council to take some formal action prior to the next hearing session or prehearing conference, the requester shall serve the request on all other parties, to be received no later than the day filed with the Council. Responses are due in the office of the Council no later than the fifth business day following service or one day prior to the hearing/prehearing session, whichever is earlier.

(b) **Motions to dismiss parties or issues.** Petitions or motions seeking the dismissal of any party or any portion of a proceeding, or that in the moving party's judgment require the submission of a written motion, petition, brief or statement of authorities, should be filed with the Council and served on other parties no later than one week prior to the first scheduled hearing session after grounds for the petition or motion become apparent, unless the Council finds that later filing is reasonable. Answers should be filed with the Council and served on other parties at least three days prior to the hearing session. Oral argument may be allowed on the record in the Council's discretion.

(c) **Motions related to evidence** or to the procedural course of the hearing, but not involving dismissal of a party or a part of the proceeding, should be stated and argued no later than the start of the day, unless they arise from matters emerging during the hearing that are not reasonably foreseeable. If a motion is not presented at the start of the day, the Council may refuse to hear it or defer it to the following day.

(d) **Potential motions.** Counsel should notify the Council no later than the start of the hearing session of any motion that may be presented during the hearing, such as one that may require foundation regarding the admissibility of evidence.

#### Written and Oral Evidence.

#### (4) Administration of evidence.

(a) **Number of copies.** When predistribution of evidence is required, each party shall file 20 copies of its evidence with the Council no later than the established filing date unless different instructions are given.

(b) **Predistributed testimony** will be treated as an exhibit and may be accompanied by other exhibits. Parties should not preassign numbers to their own prefiled testimony and exhibits. Instead the following system should be used, including the witness's initials, and marked serially. For John Q. Witness's prefiled testimony and accompanying exhibits:

Ex . . . . (JQW-T)  
Ex . . . . (JQW-1)  
Ex . . . . (JQW-2)  
Ex . . . . (JQW-3)

Parties not familiar with this method of identification may contact the Council for further guidance. The official numbers for the record will be assigned at the hearing



session.

(c) **Summary.** Each witness should present a short summary of his or her remarks at the beginning of prepared testimony.

(5) **Revisions to predistributed evidence.**

(a) **Disclosure.** A party finding it necessary to make a revision to predistributed evidence having substantive effect shall disclose the revision to other parties as soon as need for the revision is discovered.

(b) **Labelling.** Any revisions to predistributed or previously admitted testimony or exhibits shall be prominently labeled "REVISED" and bear the date of the revision. The revised portions shall be highlighted, in legislative style or other manner clearly indicating the change for comparison with the original submissions. This practice should be followed even as to minor changes that involve only one page of an exhibit. Counsel should identify revisions by page and date at the time an exhibit is presented for identification, sponsored, or offered into evidence, as appropriate.

(6) **Evidence at the hearing.**

(a) **Copies.** Each party is responsible for having one revised, corrected copy of its exhibits ready for marking and inclusion in the official record at the hearing. A second revised, corrected set of exhibits will also be needed for the court reporter.

(b) **An errata sheet** may be used to indicate the corrections to predistributed evidence for a relatively small number of relatively minor revisions. A rule of reason will apply.

(c) **Corrections and revisions** should be made or attached to all documents distributed at the hearing before the copies are distributed.

(d) **Sufficient copies.** Parties must have sufficient copies at the hearing of each document that they distribute there other than prefiled evidence so that each party, each Council member, the Council Staff, and the Council consultant may each have a copy.

(7) **Direct examination.**

(a) **Typographical corrections.** Counsel should **not** ask the witness on the stand to correct obvious typographical errors in the prefiled testimony if more than three corrections are required, but should submit an errata sheet or revised documents.

(b) **Foundation questions.** Counsel will be expected to ask several foundation questions: the witness' name and business address, whether any predistributed testimony represents the answers the witness would give if asked those questions; whether any exhibits were prepared by the witness or under her or his control or direction; and what subjects the witness will cover. The latter foundation question should request only a statement of the subjects to be covered by the witness, e.g., aquatic biota, not a summary of the witness's positions on the subjects.

(9) **Cross-examination.**

(a) **Time estimates.** For planning purposes, counsel should be prepared to provide time estimates for cross-examination of witnesses.

(b) **Limitation.** Cross-examination will be limited to two rounds except upon a showing that good cause exists.

(c) **Subject to check.** Witnesses should not be asked to perform calculations or extract detailed data on the stand. Such questions should be provided to the witness in advance or should be asked "subject to check."

(d) **Performing a check.** When a witness answers "subject to check," the witness must perform the "check" as soon as possible. A response given "subject to check" will be deemed accurate unless disputed by the witness within ten days of distribution of the transcript or by the time the record is closed, whichever occurs first.

(9) **Public testimony.**

(a) **Public orientation.** At the beginning of a hearing session for the purpose of taking testimony from members of the public, counsel for the environment may inform the public of the major contested issues and the purpose of the hearing session.

(b) **Exhibits.** Documents provided by or on behalf of members of the public at a public hearing may be offered as illustrative exhibits.

(c) **Letters.** Letters received by the Council and counsel for the environment from members of the public may be offered into evidence as illustrative of the opinions of the correspondents.

(d) **Factually probative exhibits.** Documents from the public that Counsel for the Environment believes to contain factual information of a probative nature may be offered into evidence

separately, provided that a sponsoring witness is available for cross-examination.

(e) **Expert witnesses.** If Counsel for the Environment knows that a witness intending to present evidence as a member of the public will be speaking with expertise in a technical or scientific area as opposed to expertise regarding the community, public sentiment or perception, or personal sentiment, Counsel should inform the Council in advance so that any questions of admissibility, scheduling, and rebuttal may be addressed.

(f) **Limitation to record.** Only exhibits and testimony offered and received are part of the record and subject to consideration by the Council in its decision.

**Post-hearing process.**

- (10) The Council will confer with the parties at the conclusion of the hearing about post-hearing process.

(a) **Argument, briefs.** The Council will determine whether oral argument, briefs, or both will be required, taking into consideration the parties' preferences and its own needs.

(b) **Brief format, length.** If the Council requests briefs, it may determine a format to be used by all parties. The Council will establish a maximum length for briefs. Number and complexity of the issues will be considered in setting the allowed length of briefs. Limited-issue intervenors may be allowed fewer pages than parties addressing all issues.

- (11) **Transcripts.** Each party will bear its own costs for transcripts purchased from the court reporter, including charges for expedited service when the party requests it.